

## Message Text

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ACTION IO-14

INFO OCT-01 ISO-00 AF-10 ARA-10 EA-10 EUR-12 NEA-10  
AID-05 CEA-01 CIAE-00 COME-00 EB-08 FRB-03 INR-10  
NSAE-00 USIA-06 OPIC-03 SP-02 TRSE-00 LAB-04  
SIL-01 AGRE-00 OMB-01 SS-15 L-03 JUSE-00 FTC-01  
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TO SECSTATE WASHDC 0306

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E.O. 11652: N/A  
TAGS: EGEN, ECCSOC, EINV  
SUBJECT: MARCH 23-24 IGWG SESSION ON CODE OF CONDUCT  
RELATING TO TRANSNATIONAL CORPORATIONS (TNC'S)

REF: USUN 1100

1. LAST DAY AND A HALF OF FIRST WEEK OF SESSION WAS  
DEVOTED TO GROUP DISCUSSION OF SECTION IV(B) OF CHAIR-  
MAN'S ANNOTATED OUTLINE (NATIONALIZATION AND COMPEN-  
SATION) AND QUICK REVIEW OF SEC. IV(C) (JURISDICTION).  
HIGHLIGHTS FOLLOW.

2. NATIONALIZATION AND COMPENSATION: CHAIRMAN  
(NIKLASSON) MADE PLEA TO AVOID REPEATING RIGID LINES  
OF PAST DISPUTES ON THIS SUBJECT IN SEARCH FOR NEW,  
COMPROMISE LANGUAGE. PRINCIPAL G-77 INTERVENTIONS  
(MEXICO-SEPULVEDA; NIGERIA-ABOUAH; AND INDIA-BHATT)  
NEVERTHELESS ADHERED TO USUAL THEME OF ABSENCE OF AGREED  
INTERNATIONAL LAW IN THE INVESTMENT AREA, AND OUTDATED  
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NATURE OF TRADITIONAL FORMULATION OF PROMPT, ADEQUATE  
AND EFFECTIVE COMPENSATION. WHILE STRESSING THE ESSEN-  
TIAL CALVO VIEW THAT INVESTMENT DISPUTES MUST BE GOVERNED  
BY MUNICIPAL LAW BEFORE LOCAL COURTS, HOWEVER, THESE  
INTERVENTIONS DID STRIKE CONCILIATORY TONE AND OFFERED  
SOME POSITIVE ELEMENTS.

3. FOR EXAMPLE, THE RIGHT OF NATIONALIZATION IN THE PUBLIC INTEREST OR FOR NATIONAL SECURITY WAS EMPHASIZED BY THESE SPEAKERS AS COMMON ELEMENT BETWEEN G-77 AND OECD COUNTRY VIEW, AS WELL AS DUTY TO PROVIDE JUST OR ADEQUATE COMMENSATION. ARBITRATION OR OTHER THIRD PARTY SETTLEMENT PROCEDURES SHOULD BE OPEN IF THE HOST STATE FREELY AGREES TO SUCH PROCEDURES. DUE PROCESS AND NON-DISCRIMINATION WERE MENTIONED IN CONNECTION WITH EQUALITY OF HOST STATE-INCORPORATED TNE SUBSIDIARIES AND NATIONALS OF THE STATE UNDER LOCAL LAW; IT WAS ASSERTED THAT DEVELOPING COUNTRY LEGAL SYSTEMS AFFORDED TNE'S AMPLE PROTECTION. NIGERIAN DELEGATE ACKNOWLEDGED AND IMPLIED ACCEPTANCE OF HOME GOVERNMENT DIPLOMATIC REPRESENTATIONS ON BEHALF OF TNE'S. HE ALSO EMPHASIZED TWO-WAY ASPECTS OF SOVEREIGNTY AND ECONOMIC INTERDEPENDENCE ("NO COUNTRY IS AN ISLAND"), AND THE IMPORTANCE OF A CLIMATE OF MUTUAL TRUST AND CONFIDENCE, NOTING THAT OECD GUIDELINES DID NOT SEE THE NEED TO ADDRESS NATIONALIZATION/COMPENSATION ISSUES AT ALL. USSR, GDR AND MORE FORTHCOMING ROMANIAN STATEMENTS GENERALLY REFLECTED G-77 THEMES.

4. IT WAS CLEAR, HOWEVER, THAT G-77 ARE DIVIDED ON A NUMBER OF IMPORTANT POINTS. VENEZUELAN AND PERUVIAN DELEGATES PARTED COMPANY WITH MEXICAN, AND STOOD BY ANDEAN PACT VIEWS ON ARBITRATION; LATTER DELEGATE IN LIMITED OFFICIAL USE

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RESPONSE TO US DELEGATE COMMENT ASSERTED THAT RECENT PIPELINE FINANCING ARRANGED BY PERU WITH JAPANESE INTERESTS, PROVIDING FOR ARBITRATION UNDER UK LAW, WAS FULLY CONSISTENT WITH PERU CONSTITUTION AND ANDEAN CODE. PANAMANIAN DELEGATE IN EXTENSIVE REMARKS TOOK LEAD IN ARTICULATING CALVO POSITION, REplete WITH HISTORICAL REFERENCES TO ARMED INTERVENTION IN LATIN AMERICA IN NATIONALIZATION CASES. HE EVEN TOOK ISSUE WITH SECRETARIAT ANNOTATION'S INCLUSION OF UNGA RES. 1803, AND NOTED THAT MORE CONTEMPORARY RESOLUTIONS, SINGLING OUT RES. 3171 (17 DECEMBER, 1973) IN PARTICULAR, CONTAINED NO ACKNOWLEDGEMENT OF ANY INTERNATIONAL LAW IN THIS AREA.

5. OECD COUNTRIES, LED BY USDELEGATE, EMPHASIZED CRITICAL AND FUNDAMENTAL IMPORTANCE OF SECTION AND ATTEMPTED TO PICK UP ON POSITIVE THEME OF MAIN G-77 REMARKS. INTERVENTIONS RESTATE AND CLARIFIED MEANING OF "PROMPT, ADEQUATE AND EFFECTIVE" FORMULA, UTILIZING CIEC G-8 TEXT AND LANGUAGE OF 1967 DRAFT OECD CONVENTION ON PROTECTION OF FOREIGN PROPERTY. USDELEGATE AND OTHERS INSISTED TRADITIONAL FORMULA BE REFLECTED IN TEXT OF

EXPANDED ANNOTATION, AS WELL AS ANY NEW LANGUAGE OF  
CHAIRMAN. OECD DELS ALSO EMPHASIZED MUTUALITY ARISING  
FROM NATURE OF SOVEREIGNTY IN INTERDEPENDENT WORLD  
ECONOMY, AND COMPATIBILITY WITH SOVEREIGNTY OF STRUCTURE  
OF INTERNATIONAL LAW AND FREE ACCEPTANCE OF LIMITATIONS  
ON SOVEREIGNTY SUCH AS THIRD-  
PARTY ARBITRATION PROCEDURES AND BILATERAL INVESTMENT  
PROTECTION AGREEMENTS. LINKAGES WERE MADE TO SECTIONS  
IV(A) AND IV(C) OF THE OUTLINE. UKDEL PICKED UP ON  
ABOUAH REMARK TO UNDERLINE ROLE OF HOME GOVERNMENT REPRE-  
SENTATION AND PROTECTION IF LOCAL REMEDIES EXHAUSTED  
OR INEFFECTIVE, AND NETHERLANDS DEL PLACED EMPHASIS  
ON DISPUTE SETTLEMENT REQUIREMENTS OF ARTICLES 2 AND  
33 OF UN CHARTER AND ENCOURAGEMENT OF STIPULATIONS RE-  
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GARDING DISPUTE SETTLEMENT IN INVESTMENT CONTRACTS. US  
DEL POINTED OUT THAT ISSUES OF SECTION IV(B) WENT BEYOND  
TNE'S AND PRIVATE INTERESTS. MUTUAL INTEREST OF GROUP  
MEMBERS IN RECOGNIZING ROLE OF INTERNATIONAL LAW WAS  
STRESSED. IN RESPONSE TO PANAMANIAN, USDEL NOTED THAT

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INFO OCT-01 ISO-00 AF-10 ARA-10 EA-10 EUR-12 NEA-10  
AID-05 CEA-01 CIAE-00 COME-00 EB-08 FRB-03 INR-10  
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CALVO DOCTRINE WAS PRODUCT OF AN ERA NOW OVERTAKEN BY EFFORTS TO CONSTRUCT AN ADEQUATE INTERNATIONAL LEGAL FRAMEWORK TO PROMOTE AMICABLE ADJUSTMENT AND SETTLEMENT OF DISPUTES. FRG DEL BLUNTLY NOTED THAT FAILURE TO AGREE ON SECTION IV(B) WOULD DEFEAT CODE EXERCISE, AND IN RESPONDE TO ABOUAH'S OPTIMISM THAT GAPS BETWEEN G-77 AND DEVELOPED COUNTRY POSITIONS WERE "ARTIFICIAL", INVITED G-77 TO SIMPLY MOVE TO AGREEMENT ON G-8 CIEC TEXT.

6. AS EXPECTED, NIKLASSON HAD DEVELOPED INFORMAL "COMPROMISE" FORMULA, WHICH HE PRESENTED TO GROUP AT CONCLUSION OF DISCUSSION. HIS SUMMARY NOTED PATTERN OF RESOLUTION OF DISPUTES IN THIS AREA REGARDLESS OF DOCTRINAL DIFFERENCES, OUT OF ECONOMIC SELF-INTEREST AKIN TO RELUCTANCE OF MOST DEBTOR STATES TO DEFAULT, AND CONSIGNED THE ORIGIN OF DISPUTE OVER ISSUES OF THIS SECTION TO OLD CASES OF NATURAL RESOURCE SECTOR INVESTMENTS, NOW LONG SINCE "RESOLVED". TEXT OF NIKLASSON SUGGESTION IS PICKED UP IN NEW SECRETARIAT ANNOTATIONS LIMITED OFFICIAL USE

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LDC'D TO DEPT (WORKING PAPER NO. 1/ADD. 4, PARAGRAPH 179).

7. JURISDICTION: COMPRESSED DISCUSSION OF SECTION IV(C) IN LAST TWO HOURS OF FRIDAY MEETING REVEALED CONSIDERABLE CONFUSION OVER ISSUES BEING COVERED. TO SOME EXTENT, VIEWS WERE A REHASH OF POSITIONS ON ROLES OF MUNICIPAL AND INTERNATIONAL LAW IN THE INVESTMENT AREA. GROUP, HOWEVER, AGREED THAT BROADER ISSUES OF JURISDICTION WERE INVOLVED.

8. PRINCIPAL ELEMENTS FOR DISCUSSION WERE JURISDICTION OF STATES BASED ON TERRITORIAL AND NATIONALITY PRINCIPLES (USDEL NOTED "EFFECTS" DOCTRINE AS WELL), AND NEED FOR INTERGOVERNMENTAL CONSULTATION AND COOPERATION TO RESOLVE INEVITABLE CONFLICTING REGULATION OF TNE'S. G-77 INTERVENTIONS STRESSED CONCERN ABOUT EXTRA-TERRITORIALITY OF HOME GOVERNMENT REGULATION (NIKLASSON HIMSELF POINTED OUT THIS COULD BE TWO-WAY STREET SHARED BY HOST GOVERNMENT REGULATION), AND THE USE OF TNE'S AS "CONVEYOR BELTS" FOR LAWS AND FOREIGN POLICIES OF OTHER JURISDICTIONS. NIKLASSON SEEMS INTERESTED IN NOTING NEED FOR MULTILATERAL AGREEMENT ON RULES FOR RESOLVING CONFLICTS OF JURISDICTION.

9. WITH RESPECT TO DISPUTE SETTLEMENTS BETWEEN STATES, VIEWS ON ARBITRATION AND THIRD-PARTY SETTLEMENT PRO-

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ACTION IO-14

INFO OCT-01 ISO-00 AF-10 ARA-10 EA-10 EUR-12 NEA-10

AID-05 CEA-01 CIAE-00 COME-00 EB-08 FRB-03 INR-10

NSAE-00 USIA-06 OPIC-03 SP-02 TRSE-00 LAB-04

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CEDURES TRACKED WITH DISCUSSION OF PREVIOUS SECTION.  
REGARDING DISPUTES BETWEEN TNE'S AND HOST GOVERNMENTS,  
USDEL TOOK LEAD IN HIGHLIGHTING FOUR ELEMENTS CODE  
SHOULD REFLECT: (1) ENCOURAGEMENT AND RESPECT OF  
CONTRACTUAL DISPUTE-SETTLEMENT PROVISIONS, AND RECOG-  
NITION OF RIGHT OF PARTIES TO SELECT GOVERNING LAW AND  
FORUM, INCLUDING INTERNATIONAL ARBITRATION; (2)  
EXHAUSTION OF LOCAL OR CONTRACTUAL REMEDIES  
AS CONDITION PRECEDENT TO INTERGOVERNMENTAL CLAIMS;  
(3) RECOGNITION OF ROLE OF HOME GOVERNMENT DIPLOMATIC  
FACILITATIVE ASSISTANCE AND REPRESENTATION IN THE AVOID-  
ANCE AND RESOLUTION OF DISPUTES AND RIGHT TO ASSERT  
CLAIMS; AND (4) RECOGNITION OF ROLE OF BILATERAL IN-  
VESTMENT PROTECTION, GUARANTY AND FCN AGREEMENTS.

10. NIKLASSON FOCUSED CONSIDERABLE DISCUSSION ON  
RIGHT OF PARTIES TO AN AGREEMENT TO "CONTRACT OUT"  
OF LOCAL LAW, WITH US AND CANADIAN INTERVENTIONS,  
AND NIGERIAN ON G-77 SIDE, GIVING POSITIVE VIEWS  
CONSISTENT WITH PUBLIC POLICY, CONVENIENCE OF FORUM,  
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AND SIMILAR QUALIFICATIONS; MEXICAN AND INDIAN DELS  
SUGGESTED THIS WOULD NOT BE POSSIBLE UNDER THEIR LAWS.  
COMMENTS ON ROLE OF ARBITRATION FOLLOWED NOW ESTABLISHED  
PATTERN, ALTHOUGH NIKLASSON INTRODUCED DISTINCTION  
BASED ON WHETHER HOST GOVERNMENT-TNE AGREEMENT TO AR-  
BITRATE PRE- OR POSTDATES DISPUTES. IN FORMER CASE,  
NIKLASSON SUGGESTS THAT GOVERNMENT MAY NOT BE BOUND  
IF, "WITH DUE REGARD TO RELEVANT CIRCUMSTANCES A STATE'S  
SOVEREIGN RIGHTS AND INTERESTS ARE INVOLVED". WE INTEND  
TO LINK THIS TO BRAODER ISSUE OF GOVERNMENT OBSERVANCE  
OF CONTRACTS WITH INVESTORS, AND WILL UTILIZE AS APPRO-  
PRIATE RECENT LANGUAGE RESPONDING TO GAO REPORT ON  
PETROLEUM VULNERABILITY ON THIS POINT. LEONARD

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## Message Attributes

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**Capture Date:** 01 jan 1994  
**Channel Indicators:** n/a  
**Current Classification:** UNCLASSIFIED  
**Concepts:** COMMITTEE MEETINGS, MULTINATIONAL CORPORATIONS, INVESTMENTS  
**Control Number:** n/a  
**Copy:** SINGLE  
**Draft Date:** 28 mar 1978  
**Decaption Date:** 01 jan 1960  
**Decaption Note:**  
**Disposition Action:** RELEASED  
**Disposition Approved on Date:**  
**Disposition Case Number:** n/a  
**Disposition Comment:** 25 YEAR REVIEW  
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**TAGS:** EGEN, EINV, ECOSOC, UN  
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**Type:** TE  
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